IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWANDAMBO, J.A., MAIGE, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 375 OF 2020

BADI SALEHE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Moshi)

(Mkapa, J.)

dated the 10th day of August, 2020

in

Criminal Appeal No. 33 of 2019

JUDGMENT OF THE COURT

12th & 20th March, 2024

MGEYEKWA, J.A:.

In the District Court of Moshi, Badi Salehe, the appellant was charged with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (3) of the Penal Code. It was alleged that on unknown dates between March and April, 2018 at Kilototoni – Njia panda area within the District of Moshi in Kilimanjaro Region, the appellant did have carnal knowledge of a girl aged five years who, for the sake of protecting her privacy, we will refer to her as 'PW2' as she so testified before the trial court.

The trial of the case before the District Court of Moshi involved five prosecution witnesses which included the victim of the offence (PW1), her grandmother (PW1), her mother (PW3), welfare officer (PW4) and a medical doctor (PW5).

A brief account of the evidence that led to the conviction of the appellant is briefly as follows: The victim and the appellant are relatives residing in Kilototoni – Njia panda area within the District of Moshi in Kilimanjaro Region. The victim was staying with PW1 but in between March and April, 2018, she moved to her parents' house. The crux of the victim's evidence was that, on the material day, she was with her younger brother one Tumaini and her father, then, the appellant appeared. That was not all. She recalled that, the appellant called her; removed his *dude* from his trouser and ravished her five times. Subsequently, the victim informed her father what had befallen her, but he did not take any action.

According to Agnes Wilfred Mtui (PW1), the victim was staying with her but between March and April, she moved to live with her parents. She was not aware of what had befallen the victim until May, when she received information that her granddaughter (PW1) was raped. Upon receiving the information, she confirmed that PW2 was raped.

The victim's evidence was supported by her mother, Mary Wilfred Mtui (PW3). When she was discharged from hospital, she noted that PW2 could not sit properly. When PW3 asked her, what had befallen her; she told her that her uncle had raped her. Upon receiving the victim's complaints, PW3 took the victim to Kilema hospital. Later, she took her to Habibu Bhou (PW4), the welfare officer. Her testimony was that on 4th May, 2018, PW3 arrived in her office accompanied by PW2; a community co-worker, and a police officer. Upon interrogation, PW2 informed PW4 that, on the material day, her mother was admitted with her younger brother, she remained home with her grandmother and the appellant. The appellant called and undressed her, and he ravished her. Thereafter, PW4, together with PW2 and PW3, went to Himo Hospital and obtained a PF3. Later, they took PW2 to Mawenzi Hospital. Subsequently, the incident was reported to the police station leading to the appellant's arrest.

More evidence of the encounter came from Victor Meza Kayuni, a Doctor (PW4) at Kilema Hospital who recalled that on 1st April, 2018, he examined the victim and found that her vagina had been penetrated. PW4 supported her evidence with the victim's PF3, which was admitted in evidence as exhibit P1.

The defence by the appellant was a total denial, refuting all the allegations fronted against him. He asserted that there were grudges between him and his brother. The appellant believed that the prosecution case against him was a frame-up in view of the past grudges between him and the victim's father who tried to take his land from him, and he was warned that they would do bad things to him.

In its judgment, the trial court was satisfied with the evidence of the victim which it found to have been sufficiently corroborated by PW1, PW3, PW4 and PW5. PW5 evidence was supported by the PF3 tendered in evidence and admitted as exhibit P1. The appellant was convicted and sentenced to life imprisonment.

Aggrieved by the outcome of his trial, the appellant unsuccessfully appealed to the High Court at Moshi where the conviction and sentence were sustained and the appellant's appeal was dismissed.

Still undaunted, the appellant has preferred this second appeal. He filed a memorandum of appeal containing nine grounds and subsequently additional grounds of appeal raising seven grounds which can be conveniently reduced into five grounds as follows; **one**, that, the evidence of PW2 was taken in violation of section 127 (2) of Evidence Act, **two** that, section 214 of Criminal Procedure Act (the CPA) was not

complied with, **three** that, the names of the victim in the charge sheet and evidence was at variance, **four** that, section 312 of the CPA was not complied with, and **five**, that, the case was not proved beyond reasonable doubt.

At the hearing of the appeal, the respondent was represented by two learned counsel, Ms. Sabina Silayo, learned Senior State Attorney and Ms. Neema Moshi, learned State Attorney. The appellant appeared in person and urged us to consider his grounds in the memorandum of appeal together with the additional grounds of appeal which he filed on 16th November, 2022.

Having heard his oral arguments at the hearing of the appeal, the appellant was ready to hear the response of the Republic. We shall revert to the details of the appellant's arguments in the course of determination of the issues of contention.

On the first ground of appeal, the appellant is trying to fault the preliminary hearing procedure. We have perused the record of appeal and noted that J. G. Mawole, RM signed the memorandum of agreed facts instead of P. Meena, RM. However, as rightly put by Ms. Silayo, the original record of appeal bears out that, Meena, RM conducted the

preliminary hearing and signed the memorandum of facts. Therefore, we find this complaint without substance and dismiss it.

The second ground the complaint that the provisions of section 127 (2) of the Evidence Act were flouted. For easy reference, we reproduce the section hereunder:

> *"127 (2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies."*

What happened in the case at hand, the trial magistrate tested PW2 if she understood the meaning of telling the truth upon satisfaction to that effect, PW2 gave evidence on oath. Therefore, regardless whether she understood the nature of testifying on oath, by giving evidence on oath, the victim complied with the requirement of promising to tell the truth and not lies. An issue akin to this was discussed in the case of **Mathayo Lauranee William Mollel v. Republic,** Criminal Appeal No. 53 of 2020 [2023] TZCA 52 (20 February, 2023) TanzLII. The Court stated that:

> *"In the case at hand, the child witnesses who are the victims on the counts on which the appellant*

was convicted, did not give evidence on oath or affirmation. They simply promised to tell only the truth. We think this was quite appropriate in terms of sub-section (2) of section 127 of the Evidence Act reproduced above. We are unable to agree with the appellant that the trial court ought to have conducted a test to verify whether the child witnesses knew and understood the meaning of oath or affirmation. In our considered view, that requirement would only be necessary if the child witnesses testified on oath or affirmation. We respectfully think that if a child offender age is not to testify on oath or affirmation, a preliminary test on whether he knew and understands the meaning of oath may be dispensed with".

See also: **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 195 of 2018 (unreported). Therefore, we find the complaint in the second ground of appeal wanting in substance and dismiss it.

The fourth ground of appeal seeks to fault the trial court for failure to comply with section 312 (2) of the CPA. For ease of reference, we reproduce section 312 (2) of the CPA hereunder:

"312 (2) In the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the

accused person is convicted and the punishment to which he is sentenced."

We agree with the appellant that the trial magistrate did not comply with the requirement of the law. After hearing the defence case, the trial magistrate proceeded to enter conviction against the appellant without citing any provision of the law and specifying the offence for which the appellant was charged. However, the omission is minor that cannot affect the validity of the proceedings. It is curable under section 388 of the CPA. This ground has no merit and we dismiss it.

We now turn to determine the last ground, whether the prosecution proved the case beyond reasonable doubt. The appellant pegs his complaint on the fact that the evidence of the prosecution witnesses was riddled with glaring contradictions and inconsistencies, thus, rendering their respective testimonies unworthy of belief.

In her submission, the learned Senior State Attorney contended that PW1's evidence was credible regardless of the contradictions she termed to be minor. She referred us to the case of **Selemani Makumba v. Republic**, [2006] T.L.R 379 for the proposition that the best evidence is that of the victim. Although, she conceded variance in

the dates of the occurrence of the incident, she argued that, such contradictions were minor which did not go to the root of the case.

It is noteworthy that when it comes to issues of contradictions and inconsistencies of the witnesses' evidence, the court has a duty to determine whether the contradictions (if any) are so material that the trial court ought to have rejected the evidence. See: **Mohamed Said Matula v. Republic** [1995] T.L.R. 3 and **Issa Hassan Uki v. Republic,** Criminal Appeal No. 129 of 2017 (unreported).

In **Dickson Elia Nsamba Shapwata v. Republic**, Criminal Appeal No. 92 of 2007, the Court quoted an excerpt from the learned authors of Sarkar, the Law of Evidence, 16th Edition, at p. 48, we find it worth reproducing the excerpt as follows:

> *"Normal discrepancies in evidence are those which are due to normal errors of observation normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not*

corrode the credibility of a party's case, material discrepancies do."

This is a second appeal where the Court will rarely disturb concurrent findings of the two courts below on matters of fact unless they are a result of misapprehension and non - discretion of the evidence on record.The principle was reiterated in the case of **Wankuru Mwita v. Republic**, Criminal Appeal No. 219 of 2012 (unreported), where the Court stated as follows:

> *"The law is well settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."*

See also: **Maganga Lushinge v.Republic**, Criminal Appeal No. 150 of 2020 (unreported).

We shall apply the above authorities to this case, and look at the circumstances pertaining to the last ground and in determining the

issue, whether from the available evidence on the record, the evidence of the prosecution was contradictory or otherwise. The record of appeal indicates that, PW3 discovered about the incident on 16th August 2018 when she was bathing the victim and noticed that the victim could not sit properly. Thus, she asked her mother (PW1) to inspect her. The story of her mother (PW3) is again different. She said that, she was the first one to be told of the incident by the victim and informed the mother of the child. Both PW1 and PW3 claim to have been informed of the rape by PW2. However, their narration on how the same was committed differs. These contradictions in our view were material.

There were other contradictions on the date, place and by whom PW3 was taken to hospital for examination. PW5 said that she was the one who took her to the hospital. She is mentioning two different hospitals not in the evidence of PW5. She mentioned the date of the victim being taken to hospital subsequent to what is narrated by PW5. The evidence of PW4 was materially contradicted by PW4. According to her evidence, on the material day, she was with her father and her young brother one Tumaini at their father's house. PW4 said that, PW2

told her that on the fateful day, her younger brother was admitted at the hospital and she remained at home with her grandmother.

As alluded to above, the second version of PW2's story differs from her testimony at the trial court. This raises reasonable doubt that it was not true. In **Bahati Makeja v. Republic,** Criminal Appeal No.118 of 2006 [2011] TZCA 31 (28 February 2011) TanzLII, the Court observed:

> *" We sincerely believe that PW1 Sailo was lying and his evidence ought not to have been believed".*

We are satisfied that the discrepancy in her testimony was not trivial to be overlooked. It went to the root of the case.

On top of that, although PW1 and PW3 claims that the matter was reported to the police, no witness from police was called. The omission to call the police officer affected the weight of the prosecution evidence since it was not established if the incident was reported to the police. The investigator was a material witnesses who was in better position to prove the exact date when the offence occurred.

It is plain from the tenor of the trial court judgment that in arriving at his conclusion, the trial magistrate relied on the victim's evidence which was the best evidence in sexual offences cases. However, there

are exceptions to the rule for not believing a witness, including the fact that the witness has given improbable or implausible evidence or the evidence has been materially contradicted by another witness or witnesses. See **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004 (unreported) and **Mohamed Said v. Republic**, Criminal Appeal No. 145 of 2017 (unreported). In the latter case, the Court observed that:

> *"We think it was never intended that the word of the victim of the sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness...."*

Cumulatively, we agree that the discrepancy in the testimonies of PW2, PW3 and PW4 were material affecting the conviction. The trial court and the first appellate court believed, the victim to be credible without taking into account the contradictions in the prosecution's case as shown above. Had the lower courts considered the discrepancies, they would not have concluded that the prosecution proved the case beyond reasonable doubt. Paying reverence to cardinal principle in criminal justice, the appellant should be given the benefit of the doubt from the unresolved inconsistences.

In the upshot, we allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. We, accordingly, order that the appellant be set at liberty forthwith unless he is held for some other lawful cause.

DATED at **MOSHI** this 19th day of March, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 20th day of March, 2024 in the presence of appellant in person and Ms. Bertina Tarimo, learned State Attorney for the respondent - Republic, is hereby certified as a true copy of the original.

W. A. HAMZA
DEPUTY REGISTRAR
COURT OF APPEAL